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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 1521

ANTHONY GIORDANO,
Petitioner,
v.
HARRY J. LEE, EDWIN ROTH and ROEY STETSON.

JAMES GIAMMANCO,
Petitioner,
v.
CHARLES McKEONE and WILLIAM BROWN.

JAMES GIAMMANCO,
Petitioner,
v.
HARRY J. LEE and JOHN WEINGART.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INDEX

	Page
Opinion Below	1
Jurisdiction	1
Questions Presented	2
Statement of the Case	2
Argument I	9
Argument II	16
Conclusion	17

CITATIONS

Cases:

Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970)	10
Altrichter v. Shell Oil Company, 263 F.2d 377, 380 (8th Cir. 1959)	11
Bass v. United States, 326 F.2d 884	12
Beauregard v. Wingard, 362 F. 2d 901 (9th Cir. 1966)	17
Caldwell v. United States, 338 F.2d 385 (CA 8th 1964)	14
City National Bank of Fort Smith, Arkansas v. Vanderboom, 422 F. 2d 211, 223 (8th Cir.) cert. denied, 399 U.S. 905 (1970)	9
Cochran v. United States, 291 F.2d 633, 636	14
Dupree v. United States, 380 F.2d 233, cert. denied 88 S.Ct. 2289, 392 U.S. 944, 20 L.Ed.2d 1407	11

Jacobsen v. Maryland Casualty Company, 336 F.2d 72, 74 (8th Cir. 1964), cert. denied, 379 U.S. 964 (1965) 10

Joyce v. Ferrazzi, 323 F.2d 931 (1st Cir. 1963) 10, 11

Marland v. Heyse, 315 F.2d 312 (10th Cir. 1963) ... 17

Mulligan v. United States (CA 8th 1966), 358 F.2d 604 14

Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 467 (1962) 9

Simpson v. Skelly Oil Company, 371 F.2d 563, 567 (8th Cir. 1967) 11

Smoot v. Chicago, Rock Island & Pacific Railroad Co., 378 F.2d 879, 883 (10th Cir. 1967) 9

Spinelli v. United States, 393 U.S. 410, 216 L.Ed. 2d 638, 89 S.Ct. 584 13

Stringer v. Dilger, 313 F.2d 536 (10th Cir. 1963) .. 17

Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc., 356 F.2d 442 (7th Cir. cert. denied, 384 U.S. 950, 1002 (1966) 10

United States v. Diebold, Inc., 369 U.S. 654, 655 (1962) 10

Williams v. Chick, 373 F.2d 330, 331 (8th Cir. 1967) 9, 10

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OPINION BELOW

The opinion of the United States Court of Appeals is reported at 434 F. 2d 1227 (1970). There was no opinion written by the United States District Court.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on December 4, 1970. Petitioners filed a petition for rehearing en banc or, in the alternative, for a rehearing which was denied on December 29, 1970. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

I

Whether Petitioners Were Entitled to a Summary Judgment Before Trial or a Directed Verdict After Trial on the Issue of Liability Only Because the Arrests of Petitioners Were Not in Good Faith and Without Probable Cause in Violation of Title 42, United States Code, Section 1983.

II

Whether Respondent Police Officers Could Rely on the Defense of Good Faith in Making the Arrests Especially When No Error Was Claimed in Submitting Such Issue to the Jury.

STATEMENT OF THE CASE

Respondents adopt petitioners' statement of the case and submit the following facts of the arrests:

Court of Appeals No. 19,825

Giordano v. Capt. Harry J. Lee, Lt. Edwin Roth and Detective Roey Stetson Arrest of March 30, 1967

The events leading up to the arrest were that Captain Lee was investigating a murder which occurred at Kincannon's Bar located at 4123 Chippewa Street, St. Louis, Missouri, at 12:10 a.m. on March 30, 1967 (A 42-43). He had official knowledge of gambling arrests from police reports of a gambling arrest which took place in December of 1966 wherein persons were arrested, including James Giammanco (A 44). The physical characteristics are a barroom with a capacity of 45 to 50 persons and at the top of the stairs to the second floor is a reinforced metal

door barred on the inside with a crowbar (Tr. 84). Inside the room is a large circular table and numerous chairs and tables (Tr. 85).

On March 10, 1967, while inside Kincannon's Bar, Captain Lee met an informant who previously, about the 1st of February, 1967, had given reliable information about a holdup which was to occur at 2921 South Brentwood Boulevard at the Stewart In-Fra-Red Commissary, and the holdup actually did occur in which one of the men was killed and another was apprehended a block away (A 45-46). On the parking lot of Kincannon's, the informant advised Captain Lee that James Giammanco, nephew of Giordano, was in there many times, and on one or two occasions with Giordano (A 46-47). The informant said there was gambling going on upstairs and that he had seen Giordano and his nephew go up the stairs two weeks prior to March 1, 1967 (A 47).

Another reliable informant, Warpy Smith, deceased, told Captain Lee in 1959 that Giordano was putting the muscle on him and that he was putting the "chop" on all gambling going on in St. Louis (A 50-51). In 1965 (A 51) an operator of a coffee house who allowed his patrons to play cards on the premises, was told by Giammanco that his uncle Giordano was a 50% partner from that day on or else he was out of business (5 Tr. 96).

Captain Lee testified he arrested Giordano on March 30, 1967, for gambling which took place between December 20 to March 30, 1967 (A 59) at Kincannon's Bar at 4123 Chippewa Street in the City of St. Louis, Missouri; he further testified that he was investigating a murder which occurred in Kincannon's Bar the early morning hours of March 30, 1967, and since the homicide division was short of help, he went to a restaurant at 2622 North Broadway to look for James Giammanco and Anthony Giordano accompanied by Lt. Roth, Detective Stetson, and Sgt.

Armstrong (A 43). Captain Lee walked past Giordano to the areaway which goes from the restaurant to the banana place, and Giordano jumped off the stool in the restaurant and he asked what Captain Lee was doing in the hallway, and Captain Lee told him he wanted to ask some questions, and after asking him some questions he became very excited and almost in a hysterical state, he began waving his arms around and shouting and screaming, grabbed Captain Lee's arm in a halfway blow or clutching motion and told him he had no right to come into his place and that he wasn't going to answer any questions. Captain Lee told him, "You've got to be calm. I want to talk to you." He kept on getting louder and louder and more hysterical, and he was placed under arrest for general peace disturbance (A 43). He swung his arms around violently and he did grab Captain Lee by the arm. Captain Lee placed him under arrest to keep the thing from boiling up to a more serious thing. Captain Lee did not grab at Giordano (A 51-52).

Captain Lee testified that he arrested Giordano for gambling over a three-month period from January to March 30, 1967 (A 52). He further testified that Giordano became practically hysterical, and he removed him from the scene by taking him into custody, and that was one of the reasons he was arrested (Tr. 116).

Mr. Giordano, on cross-examination, didn't know about his reputation being hurt (Tr. 69). Giordano at the time of arrest had a collar on his neck for a pinched nerve (Tr. 10), but he did not experience very much pain when grabbed by Captain Lee (Tr. 17). He believes he paid $50.00 or $75.00 to a Mr. Biondo for a bond, and he owes fees for legal services (Tr. 18). He further testified he paid about $125.00 or $150.00 for legal services (Tr. 19).

Court of Appeals No. 19,826

Giammanco v. Capt. McKeone and Lt. Brown
Arrest of April 19, 1967

Captain McKeone arrested Giammanco on April 19, 1967, at 1116 North 10th Street in a Legion Post (A 60). Pursuant to a telephone call (A 61) and reports for the Intelligence Unit that gambling was going on at the club (A 60), he made personal observations of the Legion Post between March 17 and April 19, 1967, checking the club three to four times a week, watching who entered and left (A 61-62). He observed Giammanco and a person named Licavoli enter the club three or four times during the surveillance and several times saw Giammanco come out of the door and stand on the sidewalk, look in all directions and go back inside (A 62).

Captain McKeone was also aware that Licavoli was arrested at the club on January 12, 1967, for being the custodian of a bet and upon searching him they found bet tabs in his pocket and a form book near the phone (A 65). Captain McKeone read into evidence police reports read by him prior to the instant arrest. Officers from the Third District on October 27, 1966, arrested James Giammanco and five other persons at Kincannon's Bar. The officers heard voices conclusive to poker playing, saw a 72-inch round table, 5 decks of cards and score sheets near the table (A 66-67).

The police reports further reflected an arrest on December 20, 1966, at Kincannon's Bar of three of the four same persons arrested in October, 1966, two others, and Giammanco. The officers entered the room and the occupants were watching television. However, two other officers heard a window open of Kincannon's and heard something hit the adjoining roof which turned out to be three decks of playing cards (A 68-69).

On the date of the arrest the front door of the Legion Post was open and Captain McKeone and Lt. Brown proceeded through the open door but the second door was locked. They knocked on the door and identified themselves, heard people moving around and some scuffing of chairs, and after three or four minutes Licavoli opened the door. Captain McKeone indicated he wanted to talk to them, arrested Giammanco and Licavoli and patted down the exterior of their persons (A 70). They were taken to police headquarters, questioned and released about four hours (Tr. 88-89).

Court of Appeals No. 19,827

Giammanco v. Capt. Lee and Sgt. Weingart
Arrest of May 9, 1967

On March 22, 1967, Mr. Paul Merli, manager of an A & P store located at 3641 South Jefferson, was held up and $290.00 was taken by an unknown white male armed with a revolver (A 105). On March 29, 1967, a Robert Voyles was arrested for the robbery, but the victims could no positively identify him (A 105).

The events leading up to the arrest of Giammanco were information received by an informant. To demonstrate the reliability of the informant, Sgt. Weingart testified Lt. Roth and he conversed several times about the informant who referred to Lt. Roth as "Sgt. Rott" (A 88). On a prior occasion the informant told Weingart that a stolen KSD-TV camera would be located at 2605 Olive Street. After determining that the camera had been stolen from police reports, Weingart and Roth went to the location, recovered the camera and some pornographic material, and arrested a subject there (A 89).

On another occasion the informant asked for "Sgt. Rott," and he being not in, Weingart took the message

that if they wanted to recover a bundle of stolen postal money orders, look behind the hedge on Louisiana just south of Lafayette Avenue. Forty Thousand Dollars of money orders were recovered (A 90).

On the day of the arrest of Giammanco, the informant called and stated to Weingart that if you want the person who held up the A & P store, get the Italian boy, Jimmy Giammanco. He stated he had seen him run from the store and get into a beat-up car. He did not convey this information sooner because he didn't know the name of Giammanco then (A 90). The same informant had given information on a stolen IBM typewriter, but by the time the tip was received, the person who had stolen it was already in custody (A 104).

After Giammanco was arrested, he was brought to the Robbery Division, and he was viewed by the victim of the robbery, Paul Merli, who could not identify Giammanco as the person who robbed him (A 106). Giammanco was released shortly thereafter (A 107).

Court of Appeals No. 19,827

Giammanco v. Capt. Lee and Sgt. Weingart
Arrest of February 23, 1968

The events preceding the arrest of Giammanco at the barber shop at 802 North Ninth Street were given by Capt. Lee. He learned that gambling activities were taking place there by surveillances of different persons. John Vitale would pick up Dave Cutter, drive him to Spring and Olive, pick up papers, then go to Grand and Olive, pick up other papers, then stop in other places in the City, and terminate the trip at the barber shop. Five other persons who were arrested for gambling were frequenting the barber shop including Giammanco. The investigation of these activities culminated in the arrest of

Dave Cutter, who was convicted on charges of interstate transportation in aid of racketeering (A 108).

On the morning of the arrest, Capt. Lee received a phone call from an unidentified female who sounded as if she were emotionally involved. She spoke of a gambling raid in South St. Louis and stated why don't you do something about the place on Ninth and Delmar. She told Capt. Lee that if you want to get the guy who is calling all the bets in, go to Ninth and Delmar at 12:30 and you will see him on the phone (A 109). At 12:30, Capt. Lee and Sgt. Weingart went to the barber shop and there was a man on the telephone, and after he turned around, they saw he was Giammanco. He hung up the phone hurriedly and had a piece of paper in his hand; he was placed under arrest (A 110). The piece of paper had two phone numbers on it (A 110). Capt. Lee allowed him to keep the paper because if he seized the paper, Giammanco would be entitled to a phone call and the handbook would be moved; Capt. Lee felt if he could get the paper from Giammanco's property, he would be able to locate the handbook (Tr. 126). However, the paper was not found after Giammanco went to the men's room in the police station (Tr. 127).

ARGUMENT

I

Whether Petitioners Were Entitled to a Summary Judgment Before Trial or a Directed Verdict After Trial on the Issue of Liability Only Because the Arrests of Petitioners Were Not in Good Faith and Without Probable Cause in Violation of Title 42, United States Code, Section 1983.

Summary Judgment

Summary judgment under Rule 56, Fed. R. Civ. P., is an extreme remedy which should be sparingly employed. **City National Bank of Fort Smith, Arkansas v. Vanderboom,** 422 F.2d 211, 223 (8th Cir.), **cert. denied,** 399 U.S. 905 (1970); **Williams v. Chick,** 373 F.2d 330, 331 (8th Cir. 1967); **Smoot v. Chicago, Rock Island and Pacific Railroad Co.,** 378 F.2d 879, 883 (10th Cir. 1967), holding that granting a summary judgment under Rule 56 is a "drastic" remedy. Further, as we stated in **Williams,** supra at 332, "a summary judgment proceeding does not provide a very satisfactory approach in tort cases." In **Poller v. Columbia Broadcasting System, Inc.,** 368 U.S. 464, 467 (1962), the Supreme Court set down the following guidelines on the application of summary judgment procedure:

> "Summary judgment should be entered only when the pleadings, depositions, affidavits, and admissions filed in the case 'show that [except as to the amount of damages] there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.' Rule 56(c), Fed. Rules Civ. Proc. This rule authorizes summary judgment 'only where the moving party is entitled to judgment as a matter of law, where it is quite clear what the truth is, . . . [and where] no genuine issue remains

> for trial . . . [for] the purpose of the rule is not to cut litigants off from their right of trial by jury if they really have issues to try.' **Sartor v. Arkansas Natural Gas Corp.**, 321 U.S. 620, 627 (1944)."

It is also settled doctrine that any inferences to be drawn from the underlying facts contained in the materials presented must be viewed in the light most favorable to the party opposing the motion for summary judgment. **Adickes v. S. H. Kress & Co.**, supra at 158-159; **United States v. Diebold, Inc.**, 369 U.S. 654, 655 (1962). Any doubt as to whether there is an issue of material fact for trial should be resolved against the moving party. **Williams v. Chick**, supra at 331; **Jacobsen v. Maryland Casualty Company**, 336 F.2d 72, 74 (8th Cir. 1964) **cert. denied**, 379 U.S. 964 (1965); **Technograph Printed Circuits, Ltd. v. Methode Electronics, Inc.**, 356 F.2d 442 (7th Cir.), **cert. denied**, 384 U.S. 950, 1002 (1966).

Summary Cause No. 19,825
Giordano v. Lee, et al.

In Cause 19,825, the Answers to Interrogatories of Capt. Lee (17K6, A 18-19), the substance was that he was investigating a murder, knew the place where the murder was committed was used for gambling, had reasonable belief that the murder was precipitated by gambling and that Giordano had knowledge of the gambling activities at this location and decided to question Giordano at his place of business. He became extremely nervous, grabbed Capt. Lee's arm and he was placed under arrest. Based upon this answer it is submitted that a public disturbance of the peace existed and this was the cause of his arrest. It is further submitted that this "unexplained gap" left a material issue of fact. **Adickes v. S. H. Kress & Co.**, 398 U.S. 144 (1970). In **Joyce v. Ferrazzi**, 323 F. 2d 931 (1st Cir. 1963), defendant police

officers answered a call for help from plaintiff's wife and when she admitted them to the house, the police took plaintiff into custody because of his irrational, even violent conduct, using no more force than the circumstances warranted. The Court held this action not to be a violation of plaintiff's civil rights.

Motion for a Directed Verdict
Cause 19,825 Giordano v. Lee, et al.

In determining whether a directed verdict should have been given for plaintiff Giordano, the evidence should be construed most favorably to the non moving party. **Simpson v. Skelly Oil Company**, 371 F. 2d 563, 567 (8th Cir. 1967); **Altrichter v. Shell Oil Company**, 263 F. 2d 377, 380 (8th Cir. 1959).

The evidence at trial showed that Captain Lee, accompanied by the other police officer defendants, were investigating a murder and gambling actions at the place of the murder which may have caused the murder. He had reason to believe that Giordano had been at the place of the murder and had been gambling on the second floor at this location (A 47).

In **Dupree v. United States**, 380 F. 2d 233, cert. denied, 88 S.Ct. 2289, 392 U.S. 944, 20 L.Ed. 2d 1407, it was held that police officers of the City of St. Louis have a right to question a suspect in a routine manner and such temporary detention is not an arrest. That is what occcurred in this case, but during the questioning, Mr. Giordano became hysterical and he was placed under arrest for general peace disturbance (A 43). Under the **Joyce v. Ferrazzi** case, supra, such arrest was not a violation of Giordano's civil rights.

Motion for Summary Judgment
Giammanco v. McKeone and Brown
No. 19,826

The evidence at this trial and the Answers to Interrogatories (A 24-26), viewed most favorably to defendants, was that the Legion Post was notorious for gambling activities and that one Licavoli was arrested there on January 12, 1967, and bet tabs and form books were found (A 65). In addition, he was fully aware that Giammanco was arrested on October 27, 1966 (A 66), and on December 20, 1967 (A 69), and there was no doubt from the circumstances and physical surroundings of Kincannon's Bar that gambling was taking place with Giammanco as one of the actors. The suspicious movements of Giammanco at the Legion Post in coming out the front door, looking in all directions (A 62-63), wiping off his car (Tr. 100), were circumstances, which Capt. McKeone took into consideration. After knocking on the door of the Legion Post, hearing scuffing of chairs (A 70), and knowing that Licavoli and Giammanco were inside and had conclusively been involved in gambling activities shortly before the instant arrest certainly was sufficient evidence to justify defendants in arresting Giammanco and justify the jury in determining that Capt. McKeone and Lt. Brown acted reasonably in the fact situation presented. As stated in **Bass v. United States**, 326 F. 2d 884, there was circumstantial evidence tending to show guilt and therefore probable cause for the arrest.

Summary Judgment
Giammanco v. Lee, et al.
No. 19,827 Count I
Arrest of May 9, 1967

In Cause 19827 involving two arrests by Capt. Lee and Sgt. Weingart of Giammanco, answers to interrogatories

of Sgt. Weingart that plaintiff was observed by an informant robbing an A & P Store (Answer to Interrogatory 17K7; A 32) left the credibility and reliability of the informant as a genuine issue of fact to be determined by further interrogatories or by trial to a jury.

Directed Verdict
Giammanco v. Lee, et al.
No. 19,827 Count I

It is submitted to the Court that the arrest of James Giammanco on May 9, 1967, for the robbery of the A & P store more than meets the standards as set forth in **Spinelli v. United States**, 393 U.S. 410, 216 L. Ed. 2d 638, 89 S.Ct. 584. The rule of the Spinelli case requires first, that the informer's report must be measured against the Aguilar's standards. The Aguilar's standards require that the informer be reliable with reasons for such reliability and there must be sufficient underlying circumstances from which the informer concluded that the person arrested had or was committing a crime.

The informant, who wanted to always talk to "Sgt. Rott" did in fact talk to Sgt. Weingart on three occasions, giving the address where a stolen camera could be located (A 89), where 40,000 in stolen money orders could be located (A 90), and the identity of a person who had stolen a typewriter, but the person who had stolen it was already in custody for the theft (A 104). It is submitted that the reliability and reasons for the reliability of the informant were impressed upon the minds of Sgt. Weingart and Capt. Lee at the time the tip was received. Had they been required to seek a warrant and such evidence of reliability of the informant was reduced to writing, the Aguilar test would have been met.

The next phase of the Aguilar test, that the informant concluded that Giammanco had robbed the A & P store is

the testimony of Sgt. Weingart. There is no doubt that he was informed that Giammanco was seen by the reliable informant running from the A & P store and get into a beat-up car (A 90). The objection of **Cochran v. United States**, 291 F. 2d 633, 636, of information from an unknown informer that defendant "may be good for a hold-up" was overcome by the testimony of Sgt. Weingart and probable cause existed for the arrest and viewing by the victim and release of Giammanco as soon as he could not be identified by the victim.

In **Caldwell v. United States**, 338 F. 2d 385 (CA 8th 1964), it was held by the Court that probable cause existed for an arrest of a holdup man. It further held, at page 389, that after a legal arrest, a person can be held in detention during the investigative stage of the case to permit witnesses to view the suspect.

Summary Judgment
Giammanco v. Lee, et al.
No. 19,827, Count II

In the second arrest of Giammanco by Capt. Lee and Sgt. Weingart on February 23, 1968, answers to interrogatories by Capt. Lee were to the effect that a female told him by telephone that bets are called in from a barber shop at Ninth and Delmar Streets at 12:30 p.m. every day. The circumstantial evidence was that there was a person on the phone in the barber shop with a small piece of paper in his hand which he concealed. Capt. Lee further answered due to his experience as a former member of the gambling squad, he reasonably believed Giammanco was phoning bets (Answers to Interrogatory 54 K 7; A 33). The issue of whether or not Capt. Lee's reasonable belief and the circumstantial evidence certainly was for the jury. In **Mulligan v. United States** (CA 8th 1966), 358 F. 2d 604, an arrest for gambling was held to be based on probable cause. It was held that betting tabs or memoranda of

bets are instrumentalities of the crime. It is submitted to the Court that the presence of Giammanco in the barber shop, the reputation of the barber shop as brought out at trial, and the reputation of Giammanco and the concealment of the slip of paper were sufficient to establish probable cause, and that such answers to interrogatories did not shut the door to a trial by jury.

Directed Verdict
Giammanco v. Lee, et al.
No. 19,827, Count II

The events preceding the arrest of Giammanco at the barber shop at 802 North Ninth Street were given by Capt. Lee. He learned that gambling activities were taking place there by surveillances of different persons. John Vitale would pick up Dave Cutter, drive him to Spring and Olive, pick up papers, then go to Grand and Olive, pick up other papers, then stop in other places in the City and terminate the trip at the barber shop (A 108). Five other persons who were arrested for gambling were frequenting the barber shop including Giammanco. The investigation of these activities culminated in the arrest of Dave Cutter, who was convicted on charges of interstate transportation in aid of racketeering (A 108).

On the morning of the arrest, Capt. Lee received a phone call from an unidentified female who sounded as if she were emotionally involved. She spoke of a gambling raid in South St. Louis and stated why don't you do something about the place on Ninth and Delmar. She told Capt. Lee that if you want to get the guy who is calling all the bets in, go to Ninth and Delmar at 12:30 and you will see him on the phone (A 109). At 12:30, Capt. Lee and Sgt. Weingart went to the barber shop and there was a man on the telephone, and after he turned around, they saw he was Giammanco. He hung up the phone hurriedly and had a piece of paper in his hand; he was placed

under arrest (A 110). The piece of paper had two phone numbers on it (A 110). Capt. Lee allowed him to keep the paper because if he seized the paper, Giammanco would be entitled to a phone call and the handbook would be moved; Capt. Lee felt if he could get the paper from Giammanco's property, he would be able to locate the handbook (Tr. 126). However, the paper was not found after Giammanco went to the men's room in the police station (Tr. 127).

Conclusion Regarding Summary Judgment and Directed Verdict

Respondents submit to the Court that the decision of the Eighth Circuit regarding summary judgment was not in conflict with the decisions of the Supreme Court of the United States or other Circuits. The answers to interrogatories in all four arrests left genuine issues of fact to be tried by a jury.

Respondents further submit that the decision of the Eighth Circuit regarding petitioner's motions for directed verdicts, under the facts of each arrest, was proper in that there were inferences from the evidence on which reasonable minds could differ as to whether the officers acted in good faith and with probable cause.

II

Whether Respondent Police Officers Could Rely on the Defense of Good Faith in Making the Arrests Especially When No Error Was Claimed in Submitting Such Issue to the Jury.

The Eighth Circuit Court of Appeals in its decision (A 5) footnote 2 points out that petitioners have claimed no error in submitting an instruction to the jury that good faith and probable cause is a defense to an action brought under 42 U.S.C., Sec. 1983. As shown in the preceding

argument on probable cause, there was enough evidence to properly submit the issue of probable cause and good faith to the jury, which in all cases found probable cause and good faith by their verdict in favor of all defendants in all cases. In **Marland v. Heyse**, 315 F.2d 312 (10th Cir. 1963), it was held that directed verdicts for defendants were improper and the issues of probable cause should have been submitted to a jury; see also **Beauregard v. Wingard**, 362 F.2d 901 (9th Cir. 1966); **Stringer v. Dilger**, 313 F.2d 536 (10th Cir. 1963).

Under the foregoing cases cited, it is submitted to the Court that there is no conflict between the decisions of the various Circuits and the decision of the Eighth Circuit and certiorari should not be granted on this issue.

CONCLUSION

It is respectfully submitted that the decision of the Eighth Circuit is not in conflict with the decisions of the other Circuits and the Supreme Court of the United States, that the decision of the Eighth Circuit is in keeping with the accepted and usual course of judicial proceedings and that the issues involved are not new or novel.

Respectfully submitted

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